IMMIGRATION AND PROTECTION TRIBUNAL NEW ZEALAND	[2012] NZIPT 800226
AT AUCKLAND	
Appellant:	AE (Egypt)
Before:	B L Burson (Member)
Counsel for the Appellant:	R Chambers
Counsel for the Respondent:	No Appearance
Date of Hearing:	14 & 26 March 2012
Date of Decision:	24 April 2012
DECISION	

INTRODUCTION

[1] This is an appeal against a decision of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining to grant refugee status and/or protected person status to the appellant, a citizen of Egypt.

[2] The appellant claims to have a well-founded fear of being persecuted in Egypt by reason of his being involved in persuading people to join the National Democratic Party (NDP), the former ruling party of now deposed President Hosni Mubarak. He claims in the current febrile environment people will seek retribution on him. He further claims that he is at risk of serious harm because the fact he is homosexual has become known in his community.

[3] Given that the same claim is relied upon in respect of all limbs of the appeal, it is appropriate to record it first.

THE APPELLANT'S CASE

[4] The account which follows is that given by the appellant at the appeal hearing. It is assessed later.

The Appellant's Evidence

Involvement with the NDP

[5] The appellant was born in the mid-1980s in a city called Z. Apart from periods when he was working in Libya the appellant and his family lived in Z. The appellant explained that he came from a poor background. Following his father's death in the late 1990s, the appellant was forced to work after school in a shop to supplement the family income.

[6] Initially, the owner of the shop gave the appellant menial jobs commensurate with his young age. However, as the appellant progressed through his teenage years and completed his schooling, he became more and more involved in the business of the store. He began working there on a full-time basis after he completed his vocational training in approximately 2004. He was given progressively more responsible roles by the owner and was by 2004 paid approximately EGP£12 per day.

[7] The appellant came to understand that the local NDP office was looking for people to help them find recruits to join the party. The appellant volunteered to do this work and was one of about 10 persons working for the local office in this way. He was told that he would be paid EGP£100 for every person that he convinced to attend the party offices and register as a member. The appellant was informed of events or seminars being organised by the NDP. He began talking to his acquaintances and people who came into the shop where he was working about the benefits of joining the NDP.

[8] As the NDP had been the dominant political party for many years, membership of the NDP was advantageous. The NDP helped members find employment and family of party members were eligible to receive treatment at government run hospitals at no cost. Also, the police in Egypt were corrupt and being a member of the NDP provided a certain amount of insurance from being subjected to arbitrary detention to solicit bribes and other forms of predatory behaviour by poorly paid police officers.

[9] The appellant explained to potential members that, in order to receive such advantages, they would be required to give up some of their time to attend upcoming seminars and events organised by the NDP but that the benefits of having NDP membership were worthwhile.

[10] The appellant explained that despite encouraging others to become formal members of the party, he never did. He did not agree with the party politically and saw it as "a vampire sucking the blood of the Egyptian people". He had developed a good relationship with the local head of the NDP in Z, so whenever he encountered problems with the police he simply rang this person and the problem was resolved.

[11] For the appellant, his involvement with the NDP was purely about income generation. Initially, when doing this activity while still at school, the appellant convinced no more than five people in any given month to join. However, from late 2005/early 2006, having completed his studies, he had more time and his tally increased. He now found that, on average, he was persuading 10 people per month to join. By this time, the income he received from the NDP for performing this work exceeded that which he obtained from working in the shop and was an important source of income for both him and his family.

[12] Between 2006 and 2008, the appellant was conscripted into the Egyptian Army. From time to time he was given periods of leave, during which he returned to Z. While there, he continued to recruit people to become members of the NDP.

[13] Soon after he completed his military service obligations, the appellant applied for and was issued with a genuine Egyptian passport. Using this passport, he travelled to Libya for employment. He began working in a shop. The appellant remained in Libya until mid-2010. He briefly returned for a number of weeks in late 2009 and during this time undertook his recruitment work for the NDP.

[14] When the appellant returned to Egypt in mid-2010, he found that the attitude of the local population towards the NDP had hardened considerably. Now when he spoke to people about joining the NDP people were openly hostile towards him and the NDP. Nevertheless, he persuaded a couple of people to become members. He otherwise did not try and recruit people as actively as he had previously.

[15] The appellant was concerned about the situation developing in Egypt. He began preparing for his travel to New Zealand. He obtained a place in an English

language school and was granted a New Zealand student visa. He arrived in New Zealand in mid-late 2010.

[16] The appellant told the Tribunal that since he has been in New Zealand he learnt that one of the 10 or so other people who had been responsible for gathering recruits in Z had been arrested and detained. However, he has no further information about this and does not know what was behind this person's arrest and detention.

The appellant's sexual orientation

[17] The appellant told the Tribunal that, over a period of a few years from his mid-teens, he came to understand from discussions and interactions with certain boys in his neighbourhood that they, like himself, were interested in exploring homosexual activity. At first, he was sexually active with one friend called BB. As this was something that was frowned upon in Egyptian society, the appellant and BB took extreme caution. They only engaged in homosexual activity or discussion in each other's houses when they were sure of their privacy. It was never discussed openly when meeting at cafes. The appellant did not tell his family about his sexuality. He did not believe they would accept him and thought it would cause problems. Over time, the appellant developed a circle of four or five homosexual friends including a youth called DD. While the appellant occasionally had sex with the others, his principal partner was BB.

[18] The appellant told the Tribunal that when he was in Libya he had a relationship with a youth, CC. As in Egypt, his relationship was kept hidden from people.

[19] The appellant told the Tribunal that, three days before the hearing, he spoke to his mother. His mother told him that the people in their neighbourhood were saying that he was gay. She told him that, approximately four weeks earlier, DD had been caught having sex with another man at home. DD's parents beat him and he divulged the names of other homosexuals in the neighbourhood. He named the appellant as one of them. The appellant's mother is unwell so the appellant denied the allegations. His brother, who was home at the time refused to speak to him.

[20] The appellant told the Tribunal that it is not possible for him to lead an openly gay life in Egypt. Homosexuals are despised and mistreated. If people found out he was gay, they would inform the police and he would be arrested. If

this happened, he did not think he would survive and would probably be killed in prison.

[21] The appellant told the Tribunal that, in the course of talking about social life generally in the place where he lives in New Zealand, he learnt from a person on his course that there were bars in a certain area, including gay bars. The appellant has been attending a particular bar, the ABC Bar, which is popular with homosexual men, regularly for approximately one year. The appellant has engaged in casual homosexual relationships with men he has met at the bar but has not entered into an ongoing relationship with anyone as yet. The appellant has kept this activity hidden from his friends in the Arab community in New Zealand. If he disclosed this information, he fears he would be ostracised.

Evidence of Warren John Henkel

[22] The Tribunal heard from Mr Henkel who has been the duty manager at an Auckland bar for the last six and a half years. Mr Henkel stated that the bar is frequented by many members of Auckland's gay community, but is not exclusively a gay bar.

[23] Mr Henkel told the Tribunal that for approximately the last four or five months he had seen the appellant as a frequent visitor to the bar. He has had a conversation with the appellant during which the appellant told him he was a homosexual. Mr Henkel, who is himself homosexual, believes this to be true from his observations of the appellant. On some occasions the appellant attends alone and other occasions he attends with others, both male and female. Some of the males he has seen the appellant entering the bar with appeared to Mr Henkel to also be homosexual, although he has not had any discussions with the appellant or these people about this.

[24] While in the bar the appellant drinks and talks to some of the gay men. However, because he is busy with his duties, Mr Henkel does not have that much time to take notice of when individual patrons such as the appellant leave and if so, who with.

Material and Submissions Received

[25] On 8 March 2012, the Tribunal received from counsel a bundle of submissions dated 7 March 2012 together with various items of country information regarding the political situation in Egypt since the revolution and

decisions of the Tribunal regarding the position for homosexual people in Egypt. On 28 March 2012, the Tribunal received handwritten statements from Mr Henkel and from Mr Gray, another duty manager at the same bar. Both men confirmed they had seen the appellant at the bar and it is their belief that he is gay.

ASSESSMENT

[26] Under section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

- (a) a refugee under the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention") (section 129); and
- (b) a protected person under the 1984 Convention Against Torture (section 130); and
- (c) a protected person under the 1966 International Covenant on Civil and Political Rights ("the ICCPR") (section 131).

[27] In determining whether the appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellant's account.

Credibility

[28] The appellant's evidence about his involvement with the NDP was broadly consistent with what he had said to the RSB and in his statement. A discrepancy has arisen as to the date he became involved with the NDP and what his formal status was. The appellant has explained that he is generally poor with dates and that those differences have arisen as regards being a member of the party because of translation difficulties. Having regard to the otherwise consistent and plausible information given by the appellant, as well as his demeanour, the Tribunal accepts these explanations and accepts that the appellant was engaged in the activities for the NDP as he claims.

[29] As to the appellant's claim to be gay, the Tribunal notes that he did not disclose that he was gay in his confirmation of claim form or during his RSB interview. It only emerged when credibility issues regarding his claim to have been active for the NDP were raised by the RSB. The appellant's explanation for

this was that, coming from his cultural background, he found it difficult to talk about his sexuality and that furthermore, the nature of the police and judicial system in Egypt was very different from New Zealand. He was generally distrustful of the authorities and it was not until after the RSB interview that he felt comfortable disclosing this fact to his lawyer.

[30] The appellant's failure to disclose his sexuality at an early stage leaves the tribunal with some doubt about this aspect of his claim. However, his explanation that his reticence is grounded in the taboos surrounding gay life in Egypt is not implausible. Further, the appellant gave a consistent account of his gay life both in Egypt and New Zealand over two separate hearing days. Finally, his claim to have been frequenting a well known gay bar has been corroborated by the evidence of Mr Henkel, who believes him to be gay and by the witness statement of one other man, who expressed the same opinion.

[31] Weighing all of the evidence, the Tribunal finds it is left in some doubt about this aspect of the claim and the appellant is entitled to the benefit of that doubt in accordance with well established legal principles: see *Jiao v Refugee Status Appeals Authority* [2003] NZAR 647.

[32] The Tribunal therefore finds that the appellant is a homosexual man from Egypt who has been living a discreet homosexual life in Egypt since his teenage years. Recently, his homosexuality has been made public knowledge in the neighbourhood in which he lived when a former friend and occasional sexual partner has been caught engaging in homosexual activity by his family and who divulged the appellant's name as a former partner when beaten by his parents. The appellant has also acted as a low level activist for the former ruling NDP since 2004 who encouraged people from his area to join the NDP.

The Refugee Convention

[33] Section 129(1) of the Act provides that:

"A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention."

[34] Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

"... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and

being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[35] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

Assessment of the Claim to Refugee Status

[36] For the purposes of refugee determination, "being persecuted" has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection – see *Refugee Appeal No* 74665/03 (7 July 2004) at [36]-[90]. Put another way, persecution can be seen as the infliction of serious harm, coupled with the failure of state protection – see *Refugee Appeal No* 71427 (16 August 2000), at [67].

[37] In determining what is meant by "well-founded" in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008) at [57].

Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to Egypt?

The claim based on the NDP

[38] Since the appellant left Egypt in mid-2010, there has been a substantial change in the political landscape. The NDP has been ousted, as has Hosni Mubarak. The Supreme Council of Military Forces has assumed control and overseen fresh elections, dominated by the Muslim Brotherhood. The events are captured in Human Rights Watch *World Report: Egypt* (22 January 2012) which states:

28, only hardened the protesters' determination. On February 11 Mubarak was forced to resign and the Supreme Council of the Armed Forces (SCAF), composed of leading army figures, took over, assuming full legislative and executive powers two days later. In March voters approved constitutional amendments in a referendum, and the SCAF issued a Constitutional Declaration setting out a roadmap for holding parliamentary and presidential elections.

Overall, there was no improvement in human rights protections in Egypt. On assuming power the SCAF ordered the release of all detainees held under the Emergency Law (Law No. 162 of 1958) – numbering several thousand at the end of 2010 according to estimates by human rights groups – and promised to end the State of Emergency. However, the SCAF has continued to use special courts under the Emergency Law and has referred more than 12,000 civilians to military tribunals since January, more than the total number of civilians tried by military courts during the 30-year-long Mubarak presidency. Those referred to military tribunals have included children as young as 15, even though international law discourages trials of children in military proceedings. Furthermore, on September 10 the SCAF announced that it was expanding the scope of the Emergency Law's application, and that it would remain in force through May 2012."

[39] Unsurprisingly, the former ruling party, the NDP, has been dismantled. The Refugee Documentation Centre (Ireland) report *Treatment of National Democratic Party supporters* (16 June 2011) contains a compilation of reports gathered from various other sources regarding the treatment of NDP supporters. According to these various sources, in April 2011 an Egyptian court formally dissolved the NDP. Its liquidated assets and properties are to be handed over to the Egyptian government.

[40] This report makes clear that senior NDP figures are being arrested and detained. These include not only senior NDP figures such as Hosni Mubarak, his son and members of his inner circle, but other NDP members being investigated and charged with illegally amassing fortunes. According to a *Wall Street Journal* article cited, the list of party members being arrested is growing.

[41] The Refugee Documentation Centre (Ireland) on the same date provided analysis of the current treatment of pro-Mubarak supporters. Again, referring to a number of sources, the Centre also refers to the arrest and detention of senior NDP figures.

[42] The Tribunal accepts that there is a strong anti-NDP sentiment amongst sections of the Egyptian population. However, the appellant has provided no country information to show that persons at his low level of operation are being arrested by the government or are being targeted by people for revenge attacks.

[43] By the appellant's own account, his involvement in the NDP was marginal at best. He told the Tribunal that he did not join the party and his "sales pitch" to people was not that they should join the party because it was doing good things for

Egypt but that this was simply something that they needed to do in order to get ahead. In no way is he an apologist for the NDP or the excesses of Mubarak and his cronies. The appellant could not credibly explain why, against this background, he would be viewed with antipathy by the people in his area. For these reasons, the Tribunal finds that the appellant's risk of being persecuted because of his low level activities for the NDP falls below the real chance threshold.

As to the claim based on his sexual orientation

[44] The situation for homosexual persons in Egypt has recently been considered in *AD (Egypt)* [2011] NZIPT (15 December 2011) at [49]-[58] and by the Refugee Status Appeals Authority ("the Authority") before it in *Refugee Appeal No 76566* (7 October 2010) at [97]-[102]. Mr Chambers relies on the Tribunal's decision in *AD (Egypt)* and submitted country information considered by the Tribunal in that decision.

[45] There is little point in this panel of the Tribunal re-traversing the material in any depth and it adopts the analysis undertaken by the Tribunal and the Authority before it. In both these cases, it was accepted that, while there were no specific laws which specifically criminalise homosexuality in Egypt, "public morality laws" were being used to prosecute men suspected of being homosexual. These include Egypt's "Law on the Combating of Prostitution" (Law 10, 1961) which punishes the "habitual" practice of *di'ara* (debauchery) with fines and terms of imprisonment of up to three years. Both the Tribunal and the Authority acknowledged that aspects of the Egyptian Penal Code have also been used to prosecute homosexual behaviour. The Authority noted at [98]:

"[98] The Egyptian Penal Code has also been used to prosecute homosexual behaviour, notably, Article 98w of which proscribes "Contempt for Religion", and Article 278 proscribing "Shameless public acts"; see The International Lesbian, Gay, Bisexual, Trans and Intersex Association (IGLA), Daniel Ottosson *State-Sponsored Homophobia – A World survey of laws prohibiting same sex activity between consenting adults* (May 2010) p10; "Egypt's homosexuals find home in cyberspace" *BBC News* (15 April 2010); "Step out of the dark ages" *Middle East* (July 2008)."

[46] The Authority reviewed further country information and concluded that these laws are used from time to time to arrest suspected homosexuals:

"[99] It is evident upon a review of country reports over the past decade that the Egyptian authorities conduct sporadic arrests of suspected homosexuals in accordance with the abovementioned laws. Many of those arrested are detained, charged and placed upon trial; El Menayawi, Hassan "Activism form the closet: gay rights strategising in Egypt" *Melbourne Journal of International Law* (May 2006).

Whilst held in detention a number have been subject to serious abuse, including torture; *ibid.* In 2001, one of the largest group arrests of suspected homosexuals took place when police raided a Y City discotheque. Some 55 men were arrested, detained and placed upon trial. Convictions of three years imprisonment followed for 21 such persons, in what became known as the "Queens Boat" case; "Egypt's homosexuals find home in cyberspace" *BBC News* (15 April 2010).

[100] In recent years, suspected HIV-positive men have become a particular target of the authorities. Several such groups of men, suspected of homosexual behaviour, were rounded up and arrested by police in 2007 and 2008, resulting in convictions and sentences of imprisonment ranging from one to three years. On 14 January 2008, for example, a Y City court sentenced four men to one year of imprisonment upon "debauchery" charges, and on 28 May 2008, a Y City appeals court upheld sentences of three years imprisonment imposed on five gay men; see Human Rights Watch *Egypt: Court Upholds HIV Sentences, Reinforces Intolerance* (28 May 2008); "In the country of boys: a new book on gay life in Egypt sends shockwaves through Egyptian society" *Menassat* (14 July 2009)."

[47] More recent country information confirmed that the situation in Egypt remains substantially unchanged following the overthrow of the Mubarak regime. Recent country information was considered by the Tribunal in *AD (Egypt)*. As to this, the Tribunal noted:

"[54] The United States Department of State *Country Reports on Human Rights Practices for 2009: Egypt* (11 March 2010) ("the DOS report") refers to the practice of arresting suspected homosexuals:

"Although the law does not explicitly criminalize homosexual acts, in at least one case, police targeted homosexual persons and arrested them on charges of debauchery. On January 2, police arrested 10 men in Y City on charges of debauchery. Authorities forced the men to undergo HIV tests and anal examinations in detention. Following a May 27 court order, police released the men on May 30 and 31."

[55] The DOS report also refers to the "significant social stigma" faced by homosexual men in Egyptian society as a whole.

[56] The Tribunal finds no reason to depart from the conclusion reached by the Authority on the basis of the country information referred to, that:

"... those suspected of homosexual behaviour in Egypt are punished with severity, including imprisonment and serious physical abuse that constitutes a sustained and systemic breach of their core human rights".

[57] That conclusion is supported by recent country information. For example, the Human Rights Watch report *Work on Him Until He Confesses: Impunity for Torture in Egypt* (30 January 2011) states (at p11) that:

"As the use of torture spread beyond political dissidents to ordinary citizens in police custody or connected to criminal investigations, Human Rights Watch documented ... the routine arbitrary arrest and torture of men suspected of consensual homosexual conduct."

[58] Broad political developments since the "Arab Spring" have also brought the issue of sexuality to light in the context of the democratic electoral process. According to one article provided by counsel: "Egypt Islamists use homophobia to win votes" *Afrol News* (5 May 2011):

"Homosexuality is becoming an issue in the upcoming Egyptian elections, with the Muslim Brotherhood already being accused of spreading homophobia to win votes."

Application to the Facts

[48] The significant distinguishing feature between this case and that of the appellant in *AD* (*Egypt*) is that this appellant's homosexuality has become exposed in his neighbourhood as a result of the discovery of his former sexual partner's engagement in homosexual activity. Country information establishes that, should the appellant be returned to Z, there is a real chance he could be arrested and prosecuted under the various provisions of the Egyptian Penal Code and suffer either the indignity of a fine or a term of imprisonment. Country information also establishes that, his homosexuality now being discovered, there is a real chance of the appellant being arrested and beaten, tortured or otherwise mistreated during detention. By any measure, this amounts to the appellant possessing a well-founded fear of being persecuted.

[49] As the Tribunal decision in *AD* (*Egypt*) makes clear, the position for homosexuals throughout Egypt is one which requires them to live a discreet life in order to avoid being persecuted. The appellant cannot be required to live such a life in order to seek safety away from Z. For this reason, the appellant has no internal protection alterative available to him.

[50] The first principal issue is answered in the affirmative.

Is there a Convention reason for the persecution?

[51] The Tribunal has no doubt that there is a nexus to a Convention reason. It has long been a feature of the jurisprudence of the Authority that sexual orientation can be the basis for finding the existence of a particular social group. It considered that sexual orientation is a characteristic which is innate, unchangeable, or so fundamental to identity or human dignity that individuals should not be forced to forsake or change its characteristics. The Tribunal adopts that reasoning. It finds that the appellant's predicament is contributed to by his membership of a particular social group, namely, homosexuals.

[52] The second principal issue is also answered in the affirmative.

Conclusion on Claim to Refugee Status

[53] The tribunal finds the appellant is a refugee within the meaning of Article 1A(2) of the Refugee Convention. He is entitled to be recognised as a refugee under section 129 of the Act.

The Convention Against Torture

[54] Section 130(1) of the Act provides that:

"A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand."

[55] Section 130(5) of the Act provides that torture has the same meaning as in the Convention Against Torture, Article 1(1) of which states that torture is:

"... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

Conclusion on claim under Convention Against Torture

[56] Because the appellant is recognised as a refugee, he is entitled to the protection of New Zealand from *refoulement* to Egypt. The recognition of the appellant as a refugee means that he cannot be deported from New Zealand to Egypt; see Article 33 of the Refugee Convention and sections 129(2) and 164 of the Act. The exception to section 129 which is set out in section 164(3) of the Act does not apply. Therefore, there are no substantial grounds for believing the appellant would be in danger of being subjected to torture in Egypt.

The ICCPR

[57] Section 131(1) of the Act provides that:

"A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand."

Conclusion on Claim under ICCPR

[58] Again, because the appellant is recognised as a refugee he is entitled to the protection of New Zealand from *refoulement* to Egypt. For the reasons already given in relation to the claim under section 130 of the Act, there is no prospect of the appellant being deported from this country. Therefore, there are no substantial

grounds for believing that the appellant is in danger of being subjected to arbitrary deprivation of life or to cruel, inhuman or degrading treatment or punishment in Egypt. Accordingly, the appellant is not a person who requires recognition as a protected person under the ICCPR.

CONCLUSION

- [59] For the foregoing reasons, the Tribunal finds that the appellant:
 - (a) is a refugee within the meaning of the Refugee Convention;
 - (b) is not a protected person within the meaning of the Convention Against Torture;
 - (c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.
- [60] The appeal is allowed.

<u>"B L Burson"</u> B L Burson Member

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B L Burson Member